United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 190 .

No. 1355.

No. , SPECIAL CALENDAR.

FREDERICK DE B. WESTON, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE POLICE COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1903.

In the Court of Appeals of the District of Columbia

FREDERICK DE B. WESTON, Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 1355.

---

a In the Police Court of the District of Columbia, July Term, 1903.

DISTRICT OF COLUMBIA
vs.
FREDERICK DE B. WESTON. } No. 239,514. Information for Violation of Police Regulations.

Be it remembered, that in the police court of the District of Columbia, at the city of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Information.*

In the Police Court of the District of Columbia, July Term, A. D. 1903.

THE DISTRICT OF COLUMBIA, *ss:*

Andrew B. Duvall, Esq., corporation counsel, by James L. Pugh, Jr., assistant corporation counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into court, and causes the court to be informed, and complains that Frederick De B. Weston, late of the District of Columbia aforesaid, on the eleventh day of July, in the year A. D. nineteen hundred and three, in the District of Columbia aforesaid, and in the city of Washington, in a certain brick building on L street, northwest, numbered 1819 on said street, did then and there store and keep for sale gasoline without an annual license therefor, contrary to and in violation of the Police Regulations of the District of Columbia, and constituting a law of the District of Columbia.

ANDREW B. DUVALL, ESQ.,
Corporation Counsel,
By JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared Sydney Bieber this 11th day of July, A. D. 1903, and made oath before me that the facts set forth in the foregoing information are true, and those stated upon information received he believes to be true.

W. H. RUFF,
Deputy Clerk of the Police Court
of the District of Columbia.

2 In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA
vs.
FREDERIBK DE B. WESTON. } No. —.

Be it remembered that at the trial of this cause on the 15th day of July 1903 counsel for the defendant moved the court to quash the information, for the reason that the single count therein charged two separate punishable offenses to wit,

"Did then and there store and keep for sale gasoline without an annual license therefor."

And for the further reason that the information as laid did not follow section 3, article II, of the Police Regulations, being in the disjunctive in the regulation and in the conjunctive in the information.

But the court overruled the said motion, whereupon counsel for the defendant duly excepted for the purpose of applying to the Court of Appeals for a writ of error.

The defendant then entered a plea of *not guilty.*

Evidence was adduced tending to show that the defendant was licensed to conduct a general automobile storage and repair business at No. 1319 L street, northwest; that the building had been especially constructed for the purpose, of cement flooring, brick walls and iron joists, and in so far as its construction was concerned, is perfectly adapted for the business for which it was built. That although the defendant had applied for the special license required for the storage and sale of gasoline on said premises, yet said license or permit had been refused, and he was without the special permit or license required by the Police Regulations.

3 The evidence also tended to show that gasoline is an absolute necessity, (in that it is the motive force employed in the automobiles, and is also used in the cleansing of the various parts of the machinery) to the conduct of the business for which the defendant is duly licensed.

The evidence further tended to show that many times automobiles brought into the establishment for storage &c. contained within their gasoline tanks more or less unused gasoline, and that such partially filled vehicles would be stored on the premises until their owners called for them.

The evidence also tended to show — fact that the defendant holds a license or permit to store gasoline in Stanton court half a

block away in a tank buried under the ground in front of a premises which it before occupied; and that it was a custom with him, several times a day, when necessary, to send to such gasoline storage tank in Stanton court, fill a five gallon can with gasoline, the can being such as is ordinarily delivered to householders by the oil companies, and transfer the same to premises No. 1319 L street, northwest, and on said premises to transfer the contents of the said can to the gasoline tanks built in the automobiles.

That in some instances such prepared automobiles would be immediately taken away by their owners, and at other times they would remain standing on the premises until called for by their owners, and that the period of time which they would thus stand filled upon the premises would vary from ten minutes to an hour, in accordance with the period of time consumed by the owner in arriving at the place.

This concluded the evidence, whereupon the counsel for the defendant moved the court to acquit the defendant for the reason that the evidence failed to support the information and on the following grounds:

4 (1.) That the Government had failed to support the information by proving that the defendant had on the day charged therein stored and kept gasoline for sale on premises 1319 L street, northwest.

(2.) That under his license to conduct a general automobile storage and repair business, and the evidence proving the use of gasoline to be a necessity in said business, the defendant has an implied license to store gasoline in such quantities and in such manner as is usual with similar concerns and as is approved by the Police and Building Regulations.

(3.) That under the same state of facts as above, he also had the right to fill the tanks of automobiles with gasoline on the premises, and to let such automobiles remain on said premises a reasonable time; that an hour was not unreasonable; and that from ten minutes to one hour would not constitute the "storage" as contemplated in the Police Regulations.

And thereupon the court overruled the motion to acquit on the several grounds; and counsel for defendant duly excepted for the purpose of applying for a writ of error to the Court of Appeals with the same effect as if each ground had been separately overruled and duly excepted to.

And thereupon the court decided:

That in its opinion, the defendant having a license generally to store and repair automobiles, had an undoubted right to receive and store automobiles on the premises 1319 L street, northwest, regardless of the fact that the tanks of such automobiles contained more or less unused gasoline; but that the bringing of gasoline from Stanton court or elsewhere upon the premises and there transferring said gasoline to the gasoline-tank of an automobile and permitting the same to remain thereafter for any space of time whatever, constituted such storage as is prohibited by the Police Regulations,

art. II, sec. 3; and the court thereupon fined the defendant ten dollars.

5 Counsel for the defendant duly excepted and gave notice of his intention to apply for a writ of error to the Court of Appeals.

In witness whereof, and at the request of defendant's counsel, the presiding justice, signs this bill of exceptions, this 20th day of July, 1903.

(Signed) I. G. KIMBALL, *Justice.*

6 (*Copy of Docket Entries.*)

In the Police Court of the District of Columbia, July Term, A. D. 1903.

DISTRICT OF COLUMBIA *vs.* FREDERICK DE B. WESTON. } No. 239,514. Information for Violation of Police Regulations.

Defendant arraigned Tuesday, July 14, 1903. Plea: Not guilty. Exceptions taken to the rulings of the court on matters of law and notice given by defendant in open court of his intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error. Continued to July 15, 1903.

July 15, 1903.—Judgment: Guilty. Sentence: To pay a fine of ten dollars, and, in default, to be committed to the workhouse for the term of thirty days.

Recognizance in the sum of fifty dollars entered into on writ of error to the Court of Appeals of the District of Columbia upon the condition that in the event of the denial of the application for a writ of error, the defendant will, within five days next after the expiration of ten days, appear in the police court and abide by and perform its judgment, and that in the event of the granting of such writ of error, the defendant will appear in the Court of Appeals of the District of Columbia and abide by and perform its judgment in the premises. Henry R. Saunders, surety.

Thereupon proceedings stayed for ten days.

July 17, 1903.—Bill of exceptions filed.

July 20, 1903.—Bill of exceptions settled and signed.

July 29, 1903.—Writ of error received from the Court of Appeals of the District of Columbia.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable I. G. Kimball, judge of the police court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said police court, before you, between Frederick de B. Weston, plaintiff, and The District of Columbia, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Richard H. Alvey, Chief Justice of the said Court of Appeals, the 29th day of July, in the year of our Lord one thousand nine hundred and three.

[Seal Court of Appeals, District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Filed Jul- 29 1903 Joseph Y. Potts, clerk, police court, D. C.

8 In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, Joseph Y. Potts, clerk of the police court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 6 inclusive, to be true copies of originals in cause No. 239,514 wherein The District of Columbia is plaintiff and Frederick De B. Weston defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, — the city of Washington, in said District, this 8th day August, A. D. 1903.

[Seal Police Court of District of Columbia.]

JOSEPH Y. POTTS,
Clerk Police Court, Dist. of Columbia.

Endorsed on cover: District of Columbia police court. No. 1355. Frederick de B. Weston, plaintiff in error, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Aug. 10, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

October Term, 190 .

No. 1355.

No. , Special Calendar.

FREDERICK DE B. WESTON, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

ANDREW B. DUVALL,
E. H. THOMAS,
Attorneys for Defendant in Error.

Press of Washington Monotype Printing Co.

Court of Appeals, District of Columbia.

October Term, 190'

No. 1355.

No. , Special Calendar.

FREDERICK DE B. WESTON, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Plaintiff in error conducts an automobile storage and repair business at No. 1319 L street, northwest; he had applied for a license to store and sell gasoline on the premises, and license therefor was refused; frequently automobiles were, and are brought into his establishment with more or less gasoline in their tanks; the plaintiff in error holds a license to store gasoline in Stanton Court, half a block away, and that it is his custom, several times a day, when necessary, to send to Stanton Court, fill a five gallon can with gasoline and transfer the same to his premises on L street, where the gasoline is used to replenish the tanks of the automobiles; in some instances the automobiles are removed immediately from the premises and sometimes they remain thereon a period varying from ten minutes to one hour.

ARGUMENT.

The plaintiff in error was convicted in the police court of a violation of section 3, art. II, of the Police Regulations, which reads as follows:

"Sec. 3. No person shall store or keep for sale in the District of Columbia any inflammable oil or fluid composed wholly or in part of petroleum or any of its products, or any other other highly inflammable fluid, without an annual license therefor as provided in this article," etc.

The information charges that the plaintiff in error did, on the 11th day of July, 1903, at No. 1319 L street, northwest, "store and keep for sale gasoline without an annual license therefor".

I. He complains that the single count of the information charges two separate punishable offenses, and that the information does not follow the section of the Police Regulations in question, the offense being charged in the conjunctive while the regulation is couched in the disjunctive.

It is well settled that "When a statute enumerates several acts in the alternative, the doing of any of which is subject to the same punishment, all of such acts may be charged cumulatively as one offense." 10 Ency. Pl. & Pr. 536. Provided, that the acts charged be not repugnant. The same doctrine is stated in 1 Bishop's Criminal Procedure, Sec. 436, as follows: "It is common for a statute to declare that if a person does this, or this, or this, he shall be punished in a way pointed out. Now, if in a single transaction, he does all the things, he violates the statute but once and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment upon a statute of this kind may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses,

employing the conjunction 'and' where the statute has 'or' and it will not be double, and it will be established at the trial by proof of any one of them." See also Bishop on Statutory Crimes, Sec. 244.

II. The plaintiff in error also complains that the proof does not establish the commission of the offense on the date alleged.

It has been often decided in this and other jurisdictions that the time laid in an indictment need not be strictly proved.

U. S. *vs.* McCormick, 4 Cr. C. C. 104.
Dix *vs.* Corp. of Washington, 4 Cr. C. C. 114.
Howgate *vs.* U. S., 7 App. D. C. 217.
10 Ency. Pl. & Pr., 511, and cases cited.

III. Plaintiff in error claims that he has an *implied license* because of the necessity for the use of gasoline in his business.

The claim is novel. If admitted it would mean that any dealer might claim the same privilege for storing or selling dangerous explosives or substances highly inflammable and be independent of any controlling authority in respect thereof.

IV. The plaintiff in error further claims that the gasoline remained upon the premises for a reasonable time only, and was not stored within the meaning of the regulation; that from ten minutes to an hour would not constitute "storage."

This statement is not supported by the record. The record states that the automobiles remained on the premises from ten minutes to an hour; but it does not appear how long the gasoline brought from Stanton Court remained on the premises.

This claim seems to be an attempt to appeal from the judgment of the court below upon a question of fact, which, it is submitted, is not permitted under the law.

Moreover, the gasoline must have been either *in transitu* or stored. It plainly was not *in transitu.*

Whether the gasoline was "stored" or not within the meaning of the regulation, it is admitted that it was sold on the premises, and this fact, under the law quoted above, is sufficient to sustain the judgment.

V. The argument made for the plaintiff in error is based mainly upon facts which do not appear in the record of this case.

For example, on page 2, at the end of the first paragraph, it is stated that the license was refused "without reason of any kind." Such a statement hardly calls for a reply. If it be true, application for a mandamus should have been been made, and would have been instantly granted.

Again, at the bottom of page 5, it is said that permits for storage were issued to all similar establishments and also to the individual automobile owners. There is nothing in the evidence to support this statement.

Again, page 7, it is said that the building has been specially constructed for the purpose of storing gasoline. The record states, page 2, that the building was erected for the purpose of conducting a general automobile storage and repair business; but does not show, at any place, that a building adapted for the one purpose is also adapted for the other.

On page 8 it is said that plaintiff in error was licensed to conduct a well-known business, and was arrested and fined for conducting the business in the usual manner, although he had complied with every police regulation governing the same. If the reference is to the business of storing and repairing automobiles, the statement may be accepted as true, but that is not pertinent to the discussion. If the reference is to the business of storing and selling gasoline, the statement is not supported by the record. It is evident that there is a confusion of the two kinds of business all through the brief.

On page 9 it is declared that "the record shows that being refused permission to open the alley and sink a tank like others are allowed to do"—the record does not show that he applied for permission to sink a tank, or that others are allowed to do so.

If all the facts set out by the plaintiff in error are true, he may possibly be entitled to a remedy in some other form of action. So far as the record herein discloses, he has been refused a permit to store or sell gasoline at this place, but nevertheless he proceeds to do so in open defiance of the law.

Respectfully submitted,

A. B. DUVALL,
E. H. THOMAS,
Attorneys for Defendant in Error.